Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

JAMES NORWOOD HUTCHING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE RULE IN *CALDWELL V. MISSISSIPPI* APPLIES TO A DEFENDANT WHO IS CHARGED WITH A CRIME SUBJECTING HIM TO THE DEATH PENALTY BUT IS NOT SENTENCED TO DEATH.

II. WHETHER THE SIMULTANEOUS POSSESSION OF MULTIPLE FIREARMS CAN CONSTITUTE MORE THAN ONE OFFENSE UNDER 18 U.S.C. § 922(g).

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner JAMES NORWOOD HUTCHING respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Tenth Circuit on original submission on February 5, 1996, styled *United States v. Hutching*, 75 F.3d 1453 (10th Cir. 1996).

OPINIONS BELOW

The published opinion of the court of appeals styled *United States v. Hutching*, 75 F.3d 1453 (10th Cir. 1996), was entered on February 5, 1996. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition is filed within ninety (90) days from February 5, 1996, the date on which the opinion and judgment of the United States Court of Appeals for the Tenth Circuit was entered. SUP.CT.R. 13.1. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

The basis for federal jurisdiction in the court of first instance was Title 18 U.S.C. § 3231.

Joseph "Eddie" Arvizu organized a California-based drug organization which distributed cocaine and marijuana across the country in trucks. Arvizu employed numerous individuals including: Ray Molina, Arvizu's cousin and right hand man; Tony Wiscowiche, a close Arvizu confidante; Rene Villa, Molina's son-in-law, and a trusted courier for drugs and money; Gabriel Lozano, a drug courier and armed guard at the Murietta ranch; Thomas D. "Stimey" Sanchez, a guard and occasional courier, and Petitioner, an Oklahoma rancher and businessman who oversaw the cross-country transportation.

James Shiew was one of the cross-country drivers who had been recruited by Petitioner. In April 1991, a pickup truck containing nearly 100 kilograms of cocaine was stolen from the Arvizu organization by Shiew. The truck was parked at the Hulbert, Oklahoma, residence of Ruth Ford at the time of the theft. Upon learning of the truck's disappearance, Petitioner launched a search, offering a reward for the truck's recovery. Both Petitioner and Arvizu questioned Shiew about the theft, but he skillfully diverted suspicion from himself and instead implicated a man named Avery Rogers. Rogers, who operated a combination used car lot and pig farm, was a friend of Ruth Ford, from whose residence the truck had been stolen. Petitioner and Arvizu soon began to suspect that Rogers and Ford were behind the theft.

Arvizu and his party, which included Arvizu's wife, Wiscowiche and his wife, Arvizu's financial expert and his legal adviser, set up headquarters in a Tulsa hotel to oversee the recovery of the stolen drugs. The initial plan formed by Arvizu and Petitioner was to kidnap Ford and make her reveal the whereabouts of the drugs, but this plan was thwarted when Ford refused to open her door. The next plan involved an attempted kidnapping and torture of Rogers. This plan was abandoned when one of Rogers' farm animals began making noise, betraying the kidnappers' presence.

The third plan involved a roadside ambush of Rogers. As Rogers drove toward his home in a pickup, Molina blocked the road ahead of Rogers, while Petitioner blocked the rear. Molina and Sanchez then began shooting at Rogers pickup. Rogers was able to escape by reversing gears and backing his pickup off of the road

and into a wooded area, where he eventually hit a tree. Under cover of the woods, Rogers returned to his home on foot and notified the police. After the failure of this ambush, Arvizu and his party returned to California.

Arvizu continued to plot against Rogers after his return to California. In May of 1991, Arvizu introduced Wiscowiche to three non-English-speaking Mexican nationals, who came to be known as the "pistoleros", and told Wiscowiche to drive them to Oklahoma. Meanwhile, Molina recruited Joe Mendoza and McCullah in California to assist in the recovery of the stolen drugs. McCullah, Molina, Mendoza, and Sanchez all drove from California to Oklahoma together in late May.

Molina's group rendezvoused with the pistoleros at a lake house in Wagoner, Oklahoma. They were joined there by two other Mexican nationals, bringing the total to five: Poncho, Carlos, Juan, Mikey, and Roberto. Arvizu and Petitioner arrived at the lake house shortly thereafter, the latter bringing a large cache of firearms. Arvizu and Petitioner then departed the lake house, never to return. For the next two weeks, Molina supervised the group which had assembled at the lake house. During that time, several plans were devised to kill Rogers. The initial plan, formulated by Arvizu and Molina, was to kidnap and torture Rogers until he revealed the whereabouts of the drugs, then kill him. A second plan, suggested by Molina, was to go to Rogers' used car lot and kill everyone there and then to go after Ford. The plan finally adopted, designed by either Wiscowiche and McCullah, or by Sanchez, McCullah and Poncho, was to lure Rogers away from the used car lot and kill him. McCullah, being the

lone non-Hispanic, volunteered to act as the lure, reasoning that he would arouse less suspicion than the others.

The group then undertook the necessary preparatory steps. Wiscowiche and McCullah, acting on Arvizu's instructions, purchased a total of four used vehicles for the operation. At Molina's direction, McCullah and Wiscowiche also purchased ammunition for the various weapons, and Wiscowiche cleaned the weapons. Wiscowiche, McCullah, and Poncho drove around the region and selected an appropriate ambush site. McCullah, accompanied by Wiscowiche, reconnoitered the area around the used car lot. Finally, Wiscowiche attempted to cut the telephone line leading to Rogers' car lot, but inadvertently only cut the ground wire.

On June 3, 1991, McCullah, posing as a prospective customer, met Rogers at his used car lot. Rogers took McCullah for a test drive in a Pontiac Fiero, driving out to the ambush site. At the conclusion of the test drive, McCullah stated that he would return later that day, but he failed to do so. McCullah reported back to the lake house that Rogers was "going for the bait."

By the next day, June 4, 1991, everyone in a position to do so was taking steps to distance themselves from the lake house and the Rogers car lot. Arvizu took a real-estate buying trip, with bankers and realtors so he would have an alibi. Petitioner was out of state, on a horse-business trip which had taken him to Tennessee and Missouri. Molina headed for Los Angeles. He told Wiscowiche that he was sick from excessive intake of heroin, and caught an early morning flight from the Tulsa airport.

Before leaving Oklahoma, Molina gave $5,000 to Wiscowiche, and told him to distribute it to the others at the lake house, in amounts that had been chosen by Molina: $2,000 was to go to McCullah. Wiscowiche took command of the people at the lake house after Molina's departure. Wiscowiche distributed the money, and assigned participants to each of the four vehicles. Wiscowiche also distributed firearms to selected participants. McCullah, who was not given a weapon, was assigned to the van, by himself. He was then sent back to the Rogers car lot.

McCullah returned to Rogers' used car lot at about noon on June 4, 1991. McCullah chose another car, and asked to test drive it. Rogers asked one of his employees, 48-year-old Jewell Leon Collins, to accompany McCullah. Collins bore no resemblance to Rogers. Regardless, Mr. McCullah departed the lot with Mr. Collins in a 1975 Chevrolet.

McCullah drove the Chevrolet to the prearranged ambush site with Poncho and Carlos following them in another car. Mendoza and Juan were already on-site in another car to pick up the gunmen. Upon arrival at the ambush site, McCullah stopped the car and quickly exited the vehicle, leaving Collins in the vehicle. At the same time Poncho emerged from the trailing car, ran to the Chevrolet, and fired a single shot at point-blank range into Collins' head, killing him instantly. McCullah drove away in Poncho and Carlos's car, while Poncho and Carlos joined Mendoza and Juan in the waiting vehicle. The four drove onto a nearby dirt road and discarded their firearms in the undergrowth and drove to Wagoner, Oklahoma, where Wiscowiche was waiting with Sanchez

and two other Mexican nationals. Wiscowiche then led them to the Tulsa airport. Wiscowiche flew back to Los Angeles with Carlos and Poncho and the others returned by bus. Carlos and Poncho were never seen again although warrants for their arrest are outstanding. Their full names are unknown.

By June of 1991, Arvizu's drug trafficking activities had come under the scrutiny of California law enforcement officials. As the investigation progressed, some members of the organization, including Lozano, Wiscowiche and Shiew, were persuaded to come forward and cooperate with the investigation. This allowed the FBI to piece together what happened in Oklahoma and led to the eventual arrest and indictment of McCullah, Molina, Mendoza, Sanchez, and Petitioner. Arvizu fled to Mexico in January 1992 and has not been seen since.

On January 19, 1993, Petitioner was named in twenty-eight (28) counts of a twenty-nine (29) count superseding grand jury indictment issued out of the Eastern District of Oklahoma that charged him with conspiring to possess and conspiring to distribute in excess of 5 kilograms of cocaine, a Scheduled II controlled substance, and in excess of 100 kilograms of marijuana, a Scheduled I controlled substance, contrary to Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2, in violation of Title 21, United States Code, Section 846 (Count 1); possession with intent to distribute in excess of 100 kilograms of marijuana, a Scheduled I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(B)(vii) (Count 2); possession with intent to distribute in excess of 5 kilograms of cocaine, a Scheduled II controlled substance, in

violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(A) (Counts 3, 4, and 5); attempting to possess with intent to distribute in excess of 5 kilograms of cocaine, a Scheduled II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), (b)(1)(A), and 846 (Count 6); travelling in interstate commerce to facilitate the carrying on of an unlawful activity, to wit: the distribution and possession with intent to distribute more than 100 kilograms of marijuana, a Scheduled I controlled substance, contrary to Title 21, United States Code, Section 841(a)(1), (b)(1)(B), in violation of Title 18, United States Code, Section 1952 (Count 7); travelling in interstate commerce to facilitate the carrying on of an unlawful activity, to wit: the attempted distribution and possession with intent to distribute in excess of 5 kilograms of cocaine, a Scheduled II controlled substance, contrary to Title 21, United States Code, Section 841(a)(1), (b)(1)(A), in violation of Title 18, United States Code, Section 1952 (Count 8); travelling in interstate commerce to facilitate the carrying on of an unlawful activity, to wit: the attempted distribution and possession with intent to distribute in excess of 5 kilograms of cocaine, a Scheduled II controlled substance, and more than 100 kilograms of marijuana, a Scheduled I controlled substance, contrary to Title 21, United States Code, Section 841(a)(1), (b)(1)(A), and (b)(1)(B), in violation of Title 18, United States Code, Section 1952 (Count 9); travelling in interstate commerce to facilitate the carrying on of an unlawful activity, to wit: the attempted distribution and possession with intent to distribute in excess of 5 kilograms of cocaine, a Scheduled II controlled substance, and the attempted distribution and possession with

intent to distribute of cocaine, a Scheduled II controlled substance, contrary to Title 21, United States Code, Section 841(a)(1), (b)(1)(A), in violation of Title 18, United States Code, Section 1952 (Count 10); causing James Shiew to travel in interstate commerce to facilitate the carrying on of an unlawful activity, to wit: the attempted distribution and possession with intent to distribute of cocaine, a Scheduled II controlled substance, contrary to Title 21, United States Code, Section 841(a)(1), (b)(1)(A), in violation of Title 18, United States Code, Section 1952 (Count 11); travelling in interstate commerce to facilitate the carrying on of an unlawful activity, to wit: the attempted distribution and possession with intent to distribute in excess of 5 kilograms of cocaine, a Scheduled II controlled substance, and the attempted distribution and possession with intent to distribute of cocaine, a Scheduled II controlled substance, contrary to Title 21, United States Code, Section 841(a)(1), (b)(1)(A), in violation of Title 18, United States Code, Section 1952 and Title 18, United States Code, Section 2 (Count 12); conspiring to travel in interstate commerce with intent that a murder be committed in violation of the laws of the United States and the State of Oklahoma, and that the death of an individual resulted therefrom, contrary to Title 18, United States Code, Sections 1958 and 2, in violation of Title 18, United States Code, Section 371 (Count 13); travelling in interstate commerce with intent that a murder be committed in violation of the laws of the United States and the State of Oklahoma, in violation of Title 18, United States Code, Sections 1958 and 2 (Count 14); engaging in a continuing criminal enterprise in violation of Title 21, United States Code, Section 848(a) (Count 15); causing the

death of an individual while engaging in a continuing criminal enterprise in violation of Title 21, United States Code, Sections 848(a), 848(e)(1)(A), and Title 18, United States Code, Section 2 (Count 16); possessing a firearm not registered to him, in violation of Title 26, United States Code, Sections 5841, 5861(d), and 5871 (Count 17); possession of a firearm after having been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of Title 18, United States Code, Sections 922(g) and 924(a)(2) (Counts 18, 19, and 20); possession with intent to distribute in excess of ten pounds of marijuana, a Scheduled I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2 (Count 21); using and carrying a firearm during and in relation to a drug trafficking crime to wit: possession with intent to distribute marijuana contrary to Title 21, United States Code, Section 841(a)(1), in violation of Title 18, United States Code, Sections 924(c)(1) and 2 (Count 22); money laundering in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 2 (Count 23, and 24); travelling in interstate commerce to facilitate the carrying on of an unlawful activity, to wit: the possession with intent to distribute and distribution of more than 100 kilograms of marijuana and more than 5 kilograms of cocaine, contrary to Title 21, United States Code, Sections 841(a)(1), (b)(1)(A), and (b)(1)(B), and the attempted distribution and possession with intent to distribute marijuana, a Schedule I controlled substance, and cocaine, a Schedule II controlled substance, contrary to Title 21, United States Code, Sections 841(a)(1), (b)(1)(A), and (b)(1)(B) in violation of Title 18,

United States Code, Section 1952 and Title 18, United States Code, Section 2 (Count 26); attempting to possess with intent to distribute more than 5 kilograms of cocaine, a Schedule II controlled substance in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(A), (b)(1)(B), and 846, and Title 18, United States Code, Section 2 (Count 27); travelling in interstate commerce to facilitate the carrying on of an unlawful activity, to wit: the possession with intent to distribute and attempted distribution of marijuana, a Scheduled I controlled substance, contrary to Title 21, United States Code, Section 841(a)(1), in violation of Title 18, United States Code, Section 1952 (Count 28); and distribution of approximately 35 pounds of marijuana, a Scheduled I controlled substance, to James Shiew, in violation of Title 21, United States Code, Section 841(a)(1) (Count 29).

Prior to trial, the Government gave notice that it would seek the death penalty against Petitioner, and against Codefendants McCullah and Molina, as to Count 16 pursuant to Title 21, United States Code, Section 848(h)(1).

On March 11, 1993, following a jury trial that began on January 26, 1993, Petitioner was found guilty as charged in Counts 1-24, 28, and 29. Petitioner was found not guilty as charged in Counts 26 and 27.

On March 16, 1993, following the finding of guilt as to Count 16, the trial court began the sentencing hearing pursuant to Title 21, United States Code, Section 848(i)(1). On March 17, 1993, the jury rejected the death penalty.

On April 29, 1993, the district court sentenced Petitioner as follows: life imprisonment as to Counts 1, 3, 4, 5,

6, 14, 15, and 16; forty (40) years imprisonment as to Count 2; five (5) years imprisonment as to Counts 7, 8, 9, 10, 11, 12, 13, 21, 28, and 29; ten (10) years as to Counts 17, 18, 19, and 20; and twenty (20) years as to Counts 23 and 24, said terms of imprisonment to run concurrently with each other. Petitioner was further sentenced to thirty (30) years imprisonment as to Count 22, said sentence of imprisonment to run consecutive to all other sentences ordered in the case.

On appeal to the Tenth Circuit, Petitioner argued that he was denied due process of law and a fair trial when the trial judge informed the jury that the appellate process would cure any errors committed during the trial (*Caldwell* claim), that there was insufficient evidence to support his conviction for engaging in a continuing criminal enterprise, that there was insufficient evidence to support his conviction for causing the intentional killing of an individual while engaging in a continuing criminal enterprise, that the district court erred in overruling his challenge for cause of a juror who worked as a prison guard, that counts 18, 19, and 20 (for possession of a weapon by a convicted felon) were multiplicitous, and that he was denied due process of law and his right to a fair trial because of the cumulative effect of the errors committed during his trial.[1]

With respect to the *Caldwell* claim, the Court held that Petitioner lacked standing to raise it because he was not sentence to death. *Hutching*, 75 F.3d at 1457. Furthermore,

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[1] Petitioner also adopted those portions of the briefs of co-defendants McCullah, Molina, and Sanchez, that were applicable to him.

even if Petitioner did have standing, the Court felt that the challenged remarks did not constitute a *Caldwell* violation. *Id.*

With respect to Petitioner's claim that counts 18, 19, and 20 were multiplicitous, the Court held that "[t]he scattered locations of the guns constituted separate storages that permitted possession of each firearm to constitute a separate offense." *Id.*, at 1460.[2]

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

I. THE RULE IN *CALDWELL V. MISSISSIPPI* APPLIES TO A DEFENDANT WHO IS CHARGED WITH A CRIME SUBJECTING HIM TO THE DEATH PENALTY BUT IS NOT SENTENCED TO DEATH.

In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Court was presented with the question whether a capital sentence is valid when the sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests

[2] The Court also rejected Petitioner's other arguments mentioned *supra*. However, since they do not involve the present Petition, they will not be discussed further.

not with the jury but with the appellate court which later reviews the case. In so holding, the Court concluded:

> "[W]e conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.' *California v. Ramos*, 463 U.S., at 998-999, 103 S.Ct., at 3452."

Id., at 328-29, 105 S.Ct., at 2639. In evaluating the prejudicial effect of the prosecutor's argument, the Court found "the fact that review is mandated is irrelevant to the thought processes required to find that an accused should be denied mercy and sentenced to die," and that a jury could be "very receptive to the prosecutor's assurance that it can more freely 'err because the error may be corrected on appeal.'" (citing *Maggio v. Williams*, 464 U.S. 46, 54-55, 104 S.Ct. 311, 316, 78 L.Ed.2d 43 (1983) (concurring in judgment)). *Id.*, at 331, 105 S.Ct., at 2640-41. Finally, the Court recognized that

> "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role."

Id., at 333, 105 S.Ct., at 2641-42.

In the present case, Petitioner was charged with a crime **subjecting him to the death penalty**. The fact that

the jury did not impose the death penalty should not cure the harm committed. Furthermore, Petitioner submits that the *Caldwell* rationale should apply to every criminal case, regardless of the possible punishment. A sentencer should not be led to believe that the responsibility for determining the appropriateness of any sentence rests elsewhere.

II. THE SIMULTANEOUS POSSESSION OF MULTIPLE FIREARMS CANNOT CONSTITUTE MORE THAN ONE OFFENSE UNDER 18 U.S.C. § 922(g).

Title 18, United States Code, Section 922(g) provides, in pertinent part, that it is "unlawful for any person . . . who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year . . . to possess in or affecting commerce, any firearm . . . or to receive any firearm . . . which has been shipped or transported in interstate or foreign commerce."

The evil Congress sought to suppress by section 922 was the arming of felons; the section is based on the status of the offender and not the number of guns possessed. *Barrett v. United States*, 423 U.S. 212, 218, 96 S.Ct. 498, 502, 46 L.Ed.2d 450 (1976) (principal purpose was to keep firearms away from "persons Congress classified as potentially irresponsible and dangerous"); *United States v. Szalkiewicz*, 944 F.2d 653 (9th Cir. 1991); *United States v. Causey*, 609 F.2d 777 (5th Cir. 1980); *United States v. Smith*, 591 F.2d 1105 (5th Cir. 1979). *Compare United States v. Anderson*, 59 F.3d 1323 (D.C.Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 542, 133 L.Ed.2d 445 (1995) (multiple convictions

for using or carrying firearm "during and in relation to" drug trafficking crime may not be linked to single underlying predicate offense).

Simultaneous convictions and sentences for the same criminal act violates the double jeopardy clause.

CONCLUSION

For the forgoing reasons, Petitioner prays this Honorable Court will issue a writ of certiorari and review the opinions below.

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

James Norwood HUTCHING, also known as Norwood, also known as "Cowboy",
Defendant-Appellant.

No. 93-7043.

United States Court of Appeals,
Tenth Circuit.

Feb. 5, 1996.

Joseph (Sib) Abraham Jr., El Paso, Texas, for Defendant-Appellant.

Robert J. Erickson, Attorney, Department of Justice, Washington, DC (John Raley, United States Attorney, Sheldon J. Sperling and Paul G. Hess, Assistant United States Attorneys, Muskogee, Oklahoma, with him on the brief), for Plaintiff-Appellee.

Before SEYMOUR, Chief Judge, ANDERSON and KELLY, Circuit Judges.

PAUL KELLY, Jr., Circuit Judge.

Defendant-appellant James Norwood Hutching challenges his convictions for drug conspiracy, 21 U.S.C. § 846 (Count 1); possession with intent to distribute marijuana, 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(vii), and 18 U.S.C. § 2 (Count 2); possession with intent to distribute cocaine, 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 18 U.S.C. § 2 (Counts 3-5); attempt to possess with intent to distribute cocaine, 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846, and 18 U.S.C. § 2 (Count 6); interstate travel to promote racketeering, 18

U.S.C. §§ 1952, 2 (Counts 7-12, 28); conspiracy, 18 U.S.C. § 371 (Count 13); interstate travel with intent to commit murder, 18 U.S.C. §§ 1958, 2 (Count 14); continuing criminal enterprise, 21 U.S.C. § 848(a) (Count 15); killing of an individual in furtherance of a continuing criminal enterprise, 21 U.S.C. §§ 848(a), (e)(1)(A), and 18 U.S.C. § 2 (Count 16); receipt or possession of an unregistered firearm, 26 U.S.C. § 5861(d) and 18 U.S.C. § 2 (Count 17); possession of a firearm after a felony conviction, 18 U.S.C. §§ 922(g), 924(a)(2) (Counts 18-20); possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count 21); carrying a firearm during the commission of a drug trafficking crime, 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2 (Count 22); money laundering, 18 U.S.C. §§ 1956(a)(1)(A)(i), (a)(1)(B)(i), 2 (Counts 23-24); and distribution of marijuana, 21 U.S.C. § 841(a)(1) (Count 29). Our jurisdiction arises under 28 U.S.C. § 1291. We remand to the district court with instructions to vacate Mr. Hutching's conviction for drug conspiracy (Count 1); we affirm all the other convictions.

Background

The basic facts of this case are set out in *United States v. McCullah*, ___ F.3d ___, No. 93-7118 (10th Cir.1996), and need not be restated here.

Discussion

I. *Caldwell* Violation

Mr. Hutching claims that the trial court erred by informing the jury of the possibility of appellate review.

At the conclusion of voir dire, the trial judge, explaining side bar conferences to the jury, stated in part:

> So that's the reason we have this conference, but it's always about things that I have to decide, that I have to make decisions about. And the court reporter is always there so it's taken down. There aren't any secrets. That's an official record. And if I make a decision – for example, if we are over here discussing whether or not some evidence ought to be admitted, some lawyer presents some evidence – asks a question and there is an objection. And I say, "Well, let's talk about this over here." I seek their advice over here. And if I say, "No, that's not a proper question, I'm not going to ask it," but there is a record made of it, and if I was wrong about it, in error, then there is an official record made of it. Somebody could appeal on that basis, if I've made a big enough boo boo that the whole thing ought to be reversed, or a new trial, then it can be. So I want you to know that even though we talk out of your hearing, that a record is being made of everything that we talk about over here.

32 R. 84-85. Defense counsel timely objected to these statements by the trial court. Mr. Hutching argues that these statements created the danger that the jury would minimize its own role in the criminal process and deprived him of due process and a fair trial.

Mr. Hutching relies on *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), to support his contention that the trial court's remarks were prejudicial. In *Caldwell*, the prosecutor stated to the jury in closing argument of the penalty phase of a capital case:

> Now, [defense counsel] would have you believe that you're going to kill this man and they know – they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. . . . For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court.

Caldwell, 472 U.S. at 325-26, 105 S.Ct. at 2638 (plurality opinion). Concluding that such remarks lessened the jury's sense of responsibility for its decision, the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-39, 105 S.Ct. at 2639 (plurality opinion).

As an initial issue, the government contends that Mr. Hutching lacks standing to raise a *Caldwell* claim. We agree. *Caldwell* was particularly directed to the unique nature of a death sentence, and the opinion in *Caldwell* was based upon the "quantitative difference of death from all other punishments [which] requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *Id.* at 329, 105 S.Ct. at 2639 (plurality opinion). Mr. Hutching was not sentenced to death and thus lacks standing to allege a *Caldwell* violation. *Cf. Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646 (the judgment in Caldwell was only "reversed to the extent that it sustains imposition of the death penalty"). The Supreme Court has not extended *Caldwell* beyond the capital sentencing realm, and we decline to do so here.

Even if Mr. Hutching had standing to challenge the trial court's remarks (as his codefendant, Mr. McCullah, does), we do not find that the remarks constitute a *Caldwell* violation. The Supreme Court has "read *Caldwell* as 'relevant only to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.' " *Romano v. Oklahoma*, ___ U.S. ___, ___, 114 S.Ct. 2004, 2010, 129 L.Ed.2d 1 (1994) (quoting *Darden v. Wainwright*, 477 U.S. 168, 183 n. 15, 106 S.Ct. 2464, 2472 n. 15, 91 L.Ed.2d 144 (1986)). *See also Hopkinson v. Shillinger*, 888 F.2d 1286, 1293 (10th Cir.1989) (en banc), *cert. denied*, 497 U.S. 1010, 110 S.Ct. 3256, 111 L.Ed.2d 765 (1990). Here, the trial court was merely explaining how and why a record is made. The statements during voir dire did not tend to minimize the jury's responsibility with regard to the death sentence and referred only to the possibility of appellate review of the trial judge's errors during the trial, not the jury's responsibility during sentencing. In *Dugger v. Adams*, the Supreme Court stated, "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989). Mr. Hutching makes no such claim.

II. Sufficiency of the Evidence

Mr. Hutching contends that there was insufficient evidence to support his convictions for engaging in a continuing criminal enterprise (Count 15) and for causing

the intentional killing of an individual while engaging in a continuing criminal enterprise (Count 16).

In reviewing the sufficiency of evidence supporting a conviction, we examine the evidence, and all reasonable inferences to be drawn therefrom, in the light most favorable to the government and " 'ask whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Levine*, 41 F.3d 607, 610 (10th Cir.1994) (quoting *United States v. Arutunoff*, 1 F.3d 1112, 1116 (10th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 616, 126 L.Ed.2d 580 (1993)). "We consider both direct and circumstantial evidence and accept the jury's resolution of conflicting evidence and its assessment of the credibility of witnesses." *Levine*, 41 F.3d at 610.

A. Count 15

Mr. Hutching claims that the evidence fails to establish that he occupied "a position of organizer, a supervisory position, or any other position of management" with respect to five other persons in the criminal enterprise as required by the statutory definition of engaging in a continuing criminal enterprise. *See* 21 U.S.C. § 848(c).* The terms "organizer," "manager," and "supervisor" as used in § 848(c) are given their "nontechnical,

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* Section 848(c) provides:

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

'everyday meanings.' " *United States v. Jenkins*, 904 F.2d 549, 553 (10th Cir.), *cert. denied*, 498 U.S. 962, 111 S.Ct. 395, 112 L.Ed.2d 404 (1990). *See also United States v. Smith*, 24 F.3d 1230, 1233 (10th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 270, 130 L.Ed.2d 188 (1994). "[T]he defendant need not be the dominant organizer or manager of the enterprise; he need only occupy *some* managerial position with respect to five or more persons." *Jenkins*, 904 F.2d at 553 (emphasis in original). "An organizer arranges a number of people engaged in separate activities into an essentially orderly operation," and a supervisor gives orders or directions to another person who carries them out. *Smith*, 24 F.3d at 1233. *See also United States v. Apodaca*, 843 F.2d 421, 426 (10th Cir.), *cert. denied*, 488 U.S. 932, 109 S.Ct. 325, 102 L.Ed.2d 342 (1988). " 'The defendant's relationships with the other persons need not have existed at the same time, the five persons involved need not have acted in concert at the same time or with each other, and the same type of relationship need not exist between the defendant and each of the five.' " *Smith*, 24 F.3d at 1233 (quoting *Apodaca*, 843 F.2d at 426).

> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter –
>
> > (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(c).

The evidence at trial established that Mr. Hutching acted both as an organizer and as a supervisor or manager. He oversaw the cross-country transportation of drugs for the Arvizu enterprise, and he helped arrange the drug-recovery operation. Mr. Hutching concedes that there was sufficient evidence of his supervision or management of at least three individuals: James Shiew, Herman "Buck" Thornton, and Ed Thayer. However, contrary to Mr. Hutching's contention, there was also sufficient evidence that he supervised at least two other members of the criminal enterprise: Claude "Gary" Bell and Melva Ford, and there was also substantial evidence of his organizational, supervisory and managerial role in the attempts to recover the stolen drugs.

i. Claude Bell

The evidence shows that Mr. Hutching employed Claude Bell as a bodyguard. Mr. Bell accompanied Mr. Hutching on several drug-conspiracy related trips and performed or helped perform various conspiracy-related tasks at Mr. Hutching's direction, including aiding in the transport of guns from the Oklahoma lake house to Tennessee. Although there was no direct evidence that Mr. Bell knew the drug-related nature of his activities, such knowledge can be inferred from the large amount of money Mr. Bell was promised for his efforts and the furtive nature of his trips with Mr. Hutching.

ii. Melva Ford

The evidence similarly indicates that Mr. Hutching supervised or managed Melva Ford. Mr. Hutching stored

the pickup truck containing the cocaine at her residence after telling her that "[t]he truck is loaded." Even if the period of supervision may have been "quite brief" in duration, "someone who stores drugs for [a] defendant . . . is also within the ambit of the [continuing criminal enterprise] statute." *United States v. Ward*, 37 F.3d 243, 247 (6th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1388, 131 L.Ed.2d 240 (1995). The evidence indicated that Ms. Ford knew the drug-related nature of the shipment in her care; in fact her knowledge was what made her a prime suspect in the truck's disappearance.

iii. Drug Recovery Attempts

The evidence clearly revealed that Mr. Hutching played a pivotal role in the drug recovery efforts of the Arvizu organization. Mr. Wiscowiche testified that Mr. Hutching helped plan the initial drug recovery efforts and that Mr. Hutching personally led the group, which included Mr. Wiscowiche, Mr. Molina, and Mr. Sanchez, which attempted to kidnap Mr. Rogers from his home but was thwarted by the noises of farm animals. The evidence also indicated that Mr. Hutching supplied the weapons to the group at the lake house and participated in a planning meeting with Mr. Arvizu and Mr. Molina.

B. Count 16

Mr. Hutching argues that because the evidence was not sufficient to establish that he was engaged in a continuing criminal enterprise, an essential element of the crime charged in Count 16 is lacking. Given our previous discussion holding there was sufficient evidence, we

reject that argument. Mr. Hutching was indeed engaged in a continuing criminal enterprise, and the murder of Mr. Collins was part of that enterprise. Furthermore, the evidence was overwhelming that he was "working in furtherance" of the enterprise and that he "counsel[led], command[ed], induce[d], procure[d], or cause[d] the intentional killing" of Mr. Collins.

III. Multiplicity of Counts 18, 19, and 20

Mr. Hutching claims that Counts 18, 19, and 20 are multiplicitous and consequently, convictions on all three counts cannot be upheld. Counts 18, 19, and 20 each charged Mr. Hutching with unlawfully possessing a firearm as a previously convicted felon under 18 U.S.C. §§ 922(g), 924(a)(2), but each count charged Mr. Hutching with possession of a different firearm. Claims of multiplicity are subject to *de novo* review. *United States v. Wall*, 37 F.3d 1443, 1446 (10th Cir.1994).

The "simultaneous possession" of multiple firearms generally "constitutes only . . . one offense" unless there is evidence that the weapons were stored in different places or acquired at different times. *United States v. Jones*, 841 F.2d 1022, 1023 (10th Cir.1988). *See also United States v. Bonavia*, 927 F.2d 565, 568-69 (11th Cir.1991). In this case, the three weapons, while all seized on the same day, were located at different sites; one was in Mr. Hutching's bedroom, one was in a car parked in his garage, and the other was in his pickup truck. The scattered locations of the guns constituted separate storages that permitted possession of each firearm to constitute a separate offense. *Accord United States v. Gann*, 732 F.2d 714, 721

(9th Cir.), *cert. denied*, 469 U.S. 1034, 105 S.Ct. 505, 83 L.Ed.2d 397 (1984) (separate counts for firearms separately stored or acquired).

IV. Comments by Prosecutor and Trial Court

Mr. Hutching argues that certain comments by the prosecutor and by the trial court were highly prejudicial and denied him a fair trial. Mr. Hutching concedes that the two statements he complains of, standing alone, would not warrant reversal of his convictions, but contends that the cumulative effect of the statements, coupled with the other errors he alleges, constitutes reversible error. *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir.1990). We disagree.

In his opening statement, the prosecutor, in introducing his trial team to the jury, introduced Assistant United States Attorney Paul Hess as "chief of our organized crime and drug enforcement task force." Mr. Hutching does not dispute that this was a true statement of Mr. Hess' position within the United States Attorney's Office, but objected to the description as unnecessary and prejudicial because of the sinister connotations of "organized crime." The prosecutor's statement, accurate albeit unnecessary, was not prejudicial.

Mr. Hutching also takes issue with a statement made by the trial judge after both sides had rested and the jury was about to begin its deliberations. The judge stated to the jury:

> It's about 10:30 [A.M], and I don't know how long it will take you to make a decision in this

> case. It may take just an hour or so. I mean it's conceivable you could make a decision before noon.
>
> We have ordered lunch for you, I guess. . . . [I]f for some reason you make a decision before noon, well, we'll stay for it and you can go on, or you stay here and eat it, if you want to, if that's what you want to do afterwards.
>
> It may take you on into the afternoon. It's always possible it could take you on longer than that. If you should deliberate past another meal hour, you let us know.

56 R. 3838-39. The judge was seeking to make proper meal arrangements for the jury, rather than commenting on the evidence or the case. We find no error in the judge's remarks.

V. Issues Raised by Codefendants

Mr. Hutching adopts all arguments advanced by his codefendants applicable to him and reasserts some arguments raised by his codefendants. We find merit in only one of these arguments.

Mr. Hutching, unlike his codefendants, was convicted of both drug conspiracy, 21 U.S.C. § 846, and continuing criminal enterprise, 21 U.S.C. § 848(a). The drug conspiracy count is a lesser included offense of the continuing criminal enterprise count, and thus we vacate the drug conspiracy conviction. *United States v. Stallings*, 810 F.2d 973, 975-76 (10th Cir.1987). We note that drug conspiracy is not a lesser included offense of Count 16, killing in furtherance of a continuing criminal enterprise,

for the reasons set out in *United States v. McCullah*, ___ F.3d ___, No. 93-7118 (10th Cir.1996).

We have carefully considered the other arguments and find them without merit both individually and cumulatively. *See United States v. McCullah*, ___ F.3d ___, No. 93-7118 (10th Cir.1996).

Accordingly, we remand to the district court with instructions to VACATE the conviction and sentence on Count 1; we AFFIRM the remaining convictions and sentences.